86 - 1398 (1)

NUMBER:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

MS. LOURDES LENDIÁN DEYÁ, Petitioner

versus

THE BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY AND
AGRICULTURAL AND MECHANICAL COLLEGE,
ET AL., Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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69pp

QUESTIONS PRESENTED

1. Whether the record clearly and unequivocally establishes that after Petitioner, a faculty member of LSU since 1967 to date, had made out a prima facie case establishing by a preponderance of the evidence that LSU had refused and failed to tenure and/or promote her because of her sex (female) and national origin (Hispanic) in violation of the Equal Pay Act (29 U.S.C. § 206(d)), the Civil Rights Act of 1870 (42 U.S.C. § 1981), and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), that LSU's articulated legitimate, nondiscriminatory reasons—

a) Petitioner had not obtained a doctoral degree; and

b) Petitioner's publication record is inadequate or substandard—

are not clear and reasonable specific and worthy of credence when a nonerroneously required examination of the adduced factual evidence of the case is correctly made of the proof pertinent to make out a case of proscribed employment discrimination based on sex and national origin in violation of the Equal Pay Act and the Civil Rights Acts of 1870 and 1964, Title VII (42 U.S.C. §§ 1981 and 2000e et seq.), except to be pretextual and denying to Petitioner equal protection of the laws accorded to her by the Fourteenth Amendment of the Constitution of the United States?

2. Whether within the jurisdictional requirements of the laws enabling petitioner, MS. LOURDES LENDIÁN DEYÁ, to institute and prosecute this action against LSU it is contemplated and encompassed within the enactment thereof that the denial and grant of tenure in one department of a college or school of the University (LSU) must be consistent and alike in each department of a particular college or school of the University to insulate Petitioner and members of other protected minorities from being potentially and continuously victimized by

sophisticated employment schemes and maneuvers by LSU for the intentional purpose of perpetuating empirical patterns, policies, practices and usages of employment discrimination which are proscribed by the Equal Pay Act and the Civil Rights Acts of 1870 and 1964, Title VII (42 U.S.C. §§ 1981 and 2000e et seq.)?

3. Whether where empirical patterns of unlawful discrimination in employment practices, policies, customs and usages are alleged, and on the trial on the merits are shown by the Petitioner and made against LSU for the period 1972–77 and continued repeatedly uninterrupted to be recurrent and isolate unlawfully actionable acts of discrimination in employment practices, policies, customs and usages against Petitioner by LSU until Petitioner filed Charge of Discrimination with Equal Employment Opportunity Commission (EEOC) on April 6, 1977, and this Civil Action on April 28, 1981, alleging unlawful discrimination in employment practices by LSU against her based on sex (female) and national origin (Hispanic) in violation of 29 U.S.C. § 206(d) (1), and 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 2000e et seq., were continuing acts of unlawful employment practices by LSU against Petitioner; and, therefore, not time-barred under any applicable statute of limitations?

4. Whether the Court a quo made a determination of Petitioner's claim for class action relief inconsistently with the rule of fact-finding standards set forth in the case of Everitt v. City of Marshall, 703 F. 2d 207, 210 (5th Cir.), cert dn 104 S. Ct. 241 (1983)?

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TABLE OF AUTHORITIES

RULES AND REGULATIONS:

OTHERS:

None.

NUMBER:

IN THE

SUPREME COURT OF THE UNITED STATES

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MS. LOURDES LENDIÁN DEYÁ, Petitioner

versus

THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI

The petitioner, LOURDES LENDIÁN DEYÁ, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, la-11a), of which review is sought, is not for publication.

The opinion and judgment of the District Court (App. B, infra, 1b-18b) are not reported.

JURISDICTION

The Summary Calendar Opinion (App. A, infra, 1a-11a), was entered September 25, 1986.

On December 16, 1986, Mr. Justice White entered an Order Extending Time to File Petition for Writ of Certiorari (App. C, infra, 1c) to and including January 23, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the United States Constitution, Amendment XIV, § 1 (App. D, infra, 1d).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the:

1. Civil Rights Acts (42 U.S.C. §§ 1981, 1983, 1985(3), and 1986) (App. E, infra, 1e-4e).
2. Civil Rights Act of 1964, Title VII (42 U.S.C. § 2000e-2(a)(1) and (2)(App. F, infra, 1f).
3. Equal Pay Act of 1963 (29 U.S.C. § 206(d)(1) (App. G, infra, 1g).
4. Federal Rules of Civil Procedure, Rule 23(a) and (b)(2), 28 U.S.C. (App. H, infra, 1h-2h).

The pertinent texts of the foregoing are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner, LOURDES LENDIÁN DEYÁ, a white female of Hispanic national origin, has been continued in the academic rank of instructor, the lowest rung of the academic ladder, since being first hired by LSU at the commencement of the 1967-academic year.

Petitioner brought this action against Louisiana State University (LSU) alleging violations of 42 U.S.C. §§ 1981, 1983, 1985, and 1986, Title VII of the 1964 Civil Rights Act, and the Equal Pay Act of 1963 for reasons that LSU has been and is engaging in disparate treatment discriminatory employment practices, policies, customs and usages against her in that LSU, based on sex or national origin, has failed and refused to tenure or promote her in the same like manner it has tenured and promoted the following named faculty members

who are male or female Anglo-Americans who at the time of being tenured or promoted by LSU possessed relatively the same educational qualifications as that of the Petitioner during the same period of time which LSU refused and failed to tenure and promote Petitioner on the pretexts:

a) that she had not obtained a doctoral degree;

b) that her publication record was inadequate or substandard, or that she lacks scholarly research productivity, or

c) that to tenure or promote her would be educational inbreeding;

but, however, LSU hired, tenured and promoted her comparators:

1. Francis Miksa
2. Betsy St. Julien
3. Robert Dikeman
4. Patsy Perritt
5. Coleen Sallie
6. Julia King Avant
7. Earl Hart
8. Barry Daste
9. Elizabeth Norckauer
10. James Wallace Firnberg
11. Barbara Brown
12. Paul W. Murrill
13. Mary Jane Kahao,

contrary to one or more of the standards by which LSU pretextually claims it refused and failed to tenure or promote Petitioner.

The petitioner, MS. LOURDES LENDIÁN DEYÁ, is a white female of Hispanic national origin. She was born in Havana, Cuba. She received her elementary education in her native country; her high school education in Junior High of Saratoga Springs, New York, and Saint Ann Episcopal High School of Charlottesville, Virginia.

Petitioner received her college education from the University of Habana of Habana (Havana), Cuba; Randolph-Macon Woman's College of Lynchburg, Virginia; and Louisiana State University (LSU) of Baton Rouge, Louisiana.

Petitioner holds two earned degrees from LSU: a B.A. in Spanish and Languages, and a Master of Library Science (M.L.S.). Also, she has an additional 72 hours of doctoral studies at LSU.

Petitioner has also completed certain post-graduate studies at the University of Paul Valery of Montpellier, France.

Petitioner has a highly diversified educational background of exceptional qualifications; and speaks with fluency four languages: Spanish, French, Portuguese, and English.

Petitioner was hired by LSU in 1967 as an instructor in the Graduate School of Library Science. However, in 1971, the American Library Association, an accrediting agency, rendered a critical assessment of LSU's Graduate School of Library Science. In response to that report, LSU transferred Petitioner to the undergraduate faculty of the College of Education, effective as of 1972.

The pertinent part of the report issued by the accrediting agency, American Library Association, in 1971, was particularly complimentary of Petitioner and made reference to her by name and further pertinently provided:

> "... that the qualifications and backgrounds of individuals faculty members meet the standards. Each has at least one professional Library Degree, each has adequate knowledge of the subject ..."

Petitioner, MS. LOURDES LENDIÁN DEYÁ, was hired at the rank of instructor in 1967 to teach **cataloging courses** in LSU's Graduate School of Library Science, where she taught continuously until she was replaced in 1972 by her comparator, Francis Miksa, who LSU hired at the rank of Assistant Professor and paid a salary of $3,250.00 more than that which

Petitioner was then being paid after having gained five years of experience.

Dr. Carmen Del Rio, a female Hispanic, testified that she is employed by LSU in the Department of Spanish and Portuguese; that at the time of her initial hire she was All-But-Dissertation (ABD); and LSU hired her at the rank of **Instructor** and her Anglo-American comparators are initially hired at the rank of **Assistant Professor**; that each time since 1983 that she has received faculty recommendations for tenure, promotion, and/or permanent appointment the Chairman of the Department has rejected the faculty recommendations the same as it was done in the case of petitioner, MS. LOURDES LENDIÁN DEYÁ, when she received favorable recommendation of her departmental faculty in 1977.

Since 1967 to date, during the entire course of Petitioner's employment at LSU, Petitioner has been an insructor. An instructor occupies the **lowest rung on the academic ladder** and is hired on a year-to-year basis with no guarantee of continued employment.

The petitioner, MS. LOURDES LENDIÁN DEYÁ, who has been continuously employed at LSU at the rank of instructor since 1967 is not scheduled nor funded or paid to do scholarly research; but, nevertheless, her scholarly research productivity is evidenced by publications in highly professionally recognized **Refereed Journals.**

The pertinent part of LSU's Policy Statement, PS-36, provides:

> "Every recommendation for, appointment, reappointment, promotion or tenure shall be made solely on the basis of merit and the special fitness of the individual for the duty of the position."

There was testimony to the effect that **inbreeding** is an appointment of persons holding the terminal degree from LSU; and that there are instances in which it is to the advantage of the University to appoint its own graduate of a program and inbreed

for strength and be considered contributing potentially toward the enhancement of the institution; that diversity in faculty members is a contribution toward enhancement of the institution. The question is whether Petitioner's national origin and diversified educational background fit her for the duty of the position; notwithstanding, her highest degree earned is from LSU?

There was expert testimony to the effect that the M.L.S. Degree is professionally considered to be the **Terminal Degree** in Library Science; and until recent years there was not even the option to obtain a Doctorate in Library Science.

In 1977, Petitioner's departmental faculty committee on promotion and tenure highly recommended her for promotion to the rank of Assistant Professor with Tenure; but, nevertheless, LSU rejected the recommendation of the professional faculty committtee, and did not promote nor tenure Petitioner.

Petitioner's Charge of Discrimination was filed with the Equal Employment Oppotunity Commission (EEOC) on April 6, 1977, within the 180 days actionable period from October 11, 1976, when LSU also denied Petitioner, LOURDES LENDIÁN DEYÁ, promotion and/or tenure.

On April 28, 1981, Petitioner filed her complaint in this Civil Action in the United States District Court for the Middle District of Louisisana, within the actionable periods under the statutes of limitations, LSA-C.C. art. 3492 (App. I, infra, 1i), 29 U.S.C. § 255(a) (App. J, infra, 1j), and 42 U.S.C. § 2000e-5 (f)(1) (App. K, infra, 1k-2k), applicable to Petitioner's claims alleging violations of employment discrimination by LSU against her, based on sex (female) and national origin (Hispanic), under the Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§ 1981, 1983, 1985, and 1986, the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), and the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq., respectively.

At all times applicable to promotion and tenure relative to petitioner, LOURDES LENDIÁN DEYÁ, the respondent, LSU, engaged in disparate treatment discrimination in employment

practices against her in that LSU promoted and tenured her comparators who all lack one or more of the standards by which LSU pretextually claims it refused and failed to promote and tenure Petitioner.

REASONS FOR GRANTING THE WRIT

The decisions of LSU on October 11, 1976, and in the following fall of 1977, and since, for not to promote and tenure petitioner, MS. LOURDES LENDIÁN DEYÁ, a white female of Hispanic origin, were based on sex and national origin and are disparate treatment discrimination in employment practices in that LSU promoted and tenured her comparators, Francis Miksa, Betsy St. Julien, Robert Dikeman, Patsy Peritt, Coleen Sallie, Julia King Avant, Earl Hart, Barry Daste, Elizabeth Norckauer, James Wallace Firnberg, Barbara Brown, Paul W. Murrill, and Mary Jane Kahao, all Anglo-American, who at the time when LSU promoted and tenured them lack one or more of the standards by which LSU refused and failed to promote and tenure Petitioner.

Petitioner timely filed her Charge of Discrimination with EEOC on April 6, 1977, within the 180 days actionable period from October 11, 1986, when LSU refused and failed to promote or tenure her on the pretexts that:

a) she had not obtained a doctoral degree

b) her publication record was inadequate or substandard, or that she lacks scholarly research productivity, or

c) to tenure or to promote her would be educational inbreeding,

all being continuing comparative acts of disparate treatment discrimination in employment practices by LSU against her, based on sex and national origin, in violations of the Civil Rights Acts of 1870 and 1871 (42 U.S.C. §§ 1981, 1983, 1985, and 1986), the Civil Rights Act of 1964, Title VII, § 703(a)(1) and (2) (42 U.S.C. § 2000e-2(a)(1) and (2)); and the

Equal Pay Act of 1963 (29 U.S.C. §§ 206(d)(1)), relating back year-by-year to the academic year 1971-72 and to each occasion that LSU during the continuing actionable period promoted or tenured any one of her comparators contrary to any one of the standards by which LSU refused and failed to promote or tenure Petitioner; and, therefore, Petitioner's causes of action of disparate treatment discrimination in employment patterns and practices by LSU against her, based on sex and national origin, are not time-barred under any of the applicable statutes of limitations.

> Violations of Title VII may occur when certain facially neutral selection criteria are found to have disparate impact on a protected class. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq. Zaorik v. Cornell University (CA2 1984) 729 F. 2d 85, at 95 [15, 16].
>
> Plaintiff can meet ultimate burden of proof in sex discrimination case either directly by persuading court that a discriminatory reason more likely motivated defendant employer or indirectly showing that employer's proffered explanation is unworthy of credence. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1). Sweeney v. Research Foundation of St. Univ. of N.Y. (1983) 711 F. 2d 1179.
>
> Statistical evidence of disparity in placement between men and women without terminal degrees to positions of instructor and assistant professor at state university and ancedotal evidence showing inconsistency in appointing men without terminal degrees to position of

assistant professor while women without terminal degrees were appointed to position of instructor established that university following pattern or practice of discriminating based on sex with respect to rank at hire. Chang v. University of Rhode Island (DC RI 1985) 606 F. Supp. 1161, at 1208[19], Cf. FN 26.

Court are generally agreed that Congress intended to confer class action standing broadly in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Failure of named plaintiffs' counsel to timely file certification motion did not render plaintiffs inadequate representatives of class where less than two-month delay caused no prejudice to any party. Fed. Rules Civ. Proc. Rule 23(a)(4), 28 U.S.C.A.; U.S. Dist. Ct. Rule E.D.Pa., Civil Rule 27(c). Robert Alan Ins. Agency v. Girard Bank (DC Pa. 1985) 107 F.R.D. 271.

Plaintiffs' burden on motion for class certification is only to establish existence of common questions which predominate over individual questions, not to respond to any potential defenses to liability. Feb. Rules Civ. Proc. Rule 23, 28 U.S.C.A. In Re Unioil Securities Litigation (1985) 107 F.R.D. 615.

In pattern or practice Title VII cases, presumption that employer unlawfully discriminated against individual class members, which is raised by establishment of prima facie case, shifts to employer not only the burden of production, but also burden of persuading trier of fact that it is more likely than not that employer did not unlawfully discriminate against the

> individual. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C. § 2000e et seq.; 42 U.S.C. § 1983; U.S.C.A. Const. Amend. 14. Craik v. Minnesota State University Bd. (CA8 1984) 731 f. 2d 465, at 470[5] [Cf. FN 8.]
>
> Central focus of a court confronted with Title VII sex discrimination case is whether employer is treating some people less favorably than others because of their sex. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1). Sweeny v. Research Foundation of St. Univ. of N.Y. (1983) 711 F. 2d 1179.

The 180 days statute of limitations period is to definitively fix the period of time that an aggrieved Title VII employee has to file a Charge of Discrimination with EEOC from the date of the last act of discrimination by the employer against the employee. The 180 days limitations period is not to preclude the Court from addressing kindred acts of employment discrimination by the employer against the Title VII employee which occurred prior to the commencement of the running of the 180 days limitations period. The Petitioner's right to redress when a wrong has been done, and the Court's right to address that wrong done can and should only be limited by appropriate prescriptive or limitations statutes. These statutes should also be strictly interpreted and construed.

CONCLUSION

For the foregoing reasons, petitioner, LOURDES LENDIÁN DEYÁ, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Attorneys for Petitioner:

JONES & JONES

DATED: January 21, 1987

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CERTIFICATE OF SERVICE

Undersigned counsel of record for the petitioner, LOURDES LENDIÁN DEYÁ, does hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari and the accompanying Appendices are, by regular United States Mail, first-class postage prepaid, being forwarded to the opposing counsel of record, addressed as follows:

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Baton Rouge, Louisiana, this 22 day of January, 1987.

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PETITION FOR WRIT OF CERTIORARI
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APPENDIXES

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85–3708
Summary Calendar

MS. LOURDES LENDIÁN DEYÁ,

Plaintiff-Appellant,

versus

THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(SEPTEMBER 25, 1986)

Before CLARK, Chief Judge, and GARWOOD and HILL, Circuit Judges.*
GARWOOD, Circuit Judge:

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellant, Lourdes Lendián Deyá, an instructor at Louisiana State University-Baton Rouge (LSU), brought this suit against LSU alleging violations of 42 U.S.C. §§ 1981, 1983, 1985, and 1986, Title VII of the 1964 Civil Rights Act, and the Equal Pay Act of 1963. She based her complaint on a variety of assertedly discriminatory actions, most of which occurred from 1972 through 1977, and also claimed that there were certain continuing violations up to April 28, 1981, the date her suit was filed. The district court dismissed plaintiff's claims based on sections 1981, 1983, 1985, 1986 and the Equal Pay Act on grounds that the relevant limitations periods had expired. The court also granted summary judgment with respect to any Title VII claim arising more than 180 days prior to April 6, 1977, the date on which plaintiff filed her charge of discrimination with the EEOC. The court also refused to certify the case as a class action. This paring of plaintiff's complaint left only two potential violations of Title VII: LSU's refusal to promote plaintiff to a tenure track position and its alleged failure to pay her equally with her counterparts. After a six-day bench trial, the court found that neither claim was factually established and dismissed her suit with prejudice. We affirm.

Facts and Proceedings Below

The district court made detailed fact-findings, and our independent review of the record convinces us that those findings are not clearly erroneous. Fed. R. Civ. P. 52(a); see Anderson v. City of Bessemer City, 105 S.Ct. 1504, 1511-13 (1985). Rather than attempting a re-summary of the record, we will highlight only those facts we deem helpful in resolving this appeal.

LSU hired plaintiff, an Hispanic female, in 1967 as an instructor in its School of Library Science. Plaintiff held two

degrees from LSU: a B.A. in Spanish and an M.S. in Library Science. She later did some work at LSU in pursuit of her doctorate, but never completed the minimum course work required for that program.

In 1971, the American Library Association, an accrediting organization, rendered a critical assessment of LSU's School of Library Science. In response to that report, LSU shifted the undergraduate program in library science to the College of Education. As part of the transfer, plaintiff was moved from the School of Library Science to the faculty of the College of Education. Plaintiff complains of various features of this transfer, which was finally effective in 1972.

During the entire course of her employment at LSU, plaintiff has been an instructor. An instructor occupies the lowest rung on the academic ladder and is hired on a year-to-year basis with no guarantee of continued employment. The rank just above instructor is assistant professor; as a tenure track position, it carries greater stability and prestige. Normally, an assistant professor who proves to be a productive scholar is eventually promoted to the tenured position of associate professor and from there to full professor. The evidence showed that the LSU Board of Supervisors does not approve promotions unless the applicant receives favorable recommendations from their faculty colleagues, their department head, the dean of their college, the chancellor of that particular campus, and the president of the LSU system.

In the fall of 1976, plaintiff applied for promotion to assistant professor. Her faculty colleagues at the College of Education denied this request and the department chairman concurred. Subsequent administrative review was not successful, and plaintiff filed charges of sex and national origin discrimination with the EEOC on April 6, 1977. Just a few days after the faculty rejected plaintiff's request for promotion, LSU promulgated Policy Statement 36, which formalized existing university policy. Except in exceptional circumstances, it prohibited the promotion of an instructor to the rank of assistant

professor unless the applicant held the highest degree requisite in the field. The district court found, on adequate evidence, that by the times here in question, the mid-1970s, a doctorate was the highest requisite degree in both the field of library science and the field of education. Various LSU officials testified that a non-doctorate might be promoted if that person had a rich history of significant publications or had completed all course work necessary for a doctorate and lacked only the dissertation.

In 1977, after filing her EEOC complaint, plaintiff again applied for promotion and again was unsuccessful. This time the faculty approved her request, but neither the department chairman nor the dean concurred. Although plaintiff had published a bit here and there, her scholarly output was not considered adequate to overcome the absence of a doctorate. In addition to claims based on her transfer and denial of promotion, plaintiff alleged that LSU continued to compensate her discriminatorily. She argues that these instances of alleged mistreatment show she was a victim of discrimination based on her sex and national origin. After the EEOC issued its "no cause" determination and Right to Sue letter on January 30, 1981, plaintiff filed suit on April 28, 1981.

Discussion

I. Class Certification

On the second day of trial, plaintiff moved for class certification.[1] This motion was tardy under Rule 2.12 of the Eastern District of Louisiana, yet the district court gave plaintiff every opportunity to show that certification was proper under Fed. R. Civ. P. 23. On review, we must determine whether that

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[1]Her complaint described the purported class, or classes, as "females of her national origin, Hispanic females, and all other females similarly situated—who have been subjected or who in the future may be subjected to unlawful discriminatory employment practices, policies, customs, and usages—by the defendants . . . ."

court's refusal to certify was an abuse of discretion, but in making this determination we may look to the full record, including facts developed during trial. Everitt v. City of Marshall, 703 F.2d 207, 210 (5th Cir.), cert. denied, 104 S.Ct. 241 (1983).

The Supreme Court has held that class actions under Title VII, like all class actions, cannot be certified unless the prerequisites of Rule 23(a) are met. General Telephone Co. v. Falcon, 102 S.Ct. 2364, 2372 (1982). Judging from plaintiff's pleadings, as well as the evidence presented at trial, it is clear that her claims chiefly arise out of the unique facts surrounding her transfer to the College of Education and LSU's refusal to promote her; therefore, she cannot meet even one of the four conjunctive requirements of Rule 23(a). She offered no evidence that the number of persons similarly situated was so numerous that joinder was impractical. She also failed to show anything suggesting that her case met the commonality and typicality requirements, thus she certainly would not have been a proper class representative. Moreover, there was no adequate explanation for the tardiness of the motion for class certification hearing, which the district court alternatively relied on in its ruling. The district court did not abuse its discretion in refusing to certify the class.

II. Limitations Period for Claims Based on Sections 1981, 1983, 1985, 1986

On May 25, 1984, the district court granted summary judgment to defendants on all claims based on sections 1981, 1983, 1985 and 1986. These federal statutes do not have their own limitations periods, and under 42 U.S.C. § 1988 we employ the state limitations period. The district judge evidently reasoned that Louisiana's one-year limitations statute would govern a state claim analogous to plaintiff's federal claim. La. Civ. Code art. 3536 (applicable to "offenses and quasi-offenses") (revised and reenacted as art. 3492 on Jan. 1, 1986). The court then barred plaintiff's claims because they were based

on events that occurred more than a year prior to the filing of suit.

We have no quarrel with this result. We note only that the Supreme Court has since decided Wilson v. Garcia, 105 S.Ct. 1936 (1985), which changed our prior practice of searching state law for a cause of action analogous to the particular section 1983 claim in question. E.g., Pegues v. Morehouse Parish School Board, 632 F.2d 1279 (5th Cir. 1980), cert. denied, 101 S.Ct. 2322 (1981). Wilson held that all section 1983 claims are properly characterized as personal injury actions, and a single state limitations period applicable to all such claims must govern. Id. at 1949. In Louisiana a one-year limitations period governs personal injury claims, La. Civ. Code art. 3492 (successor to art. 3536). See, e.g., Bernard v. Air Logistics, Inc., 407 So.2d 469 (La. App. - 1st Cir. 1982), writ denied, 409 So.2d 656 (1982). Pre-Wilson we held that claims similar to those here under sections 1981 and 1983 are governed by the Louisiana one-year statute. See Jones v. Orleans Parish School Board, 688 F.2d 342 (5th Cir. 1982) (on rehearing), cert. denied, 103 S.Ct. 2420 (1983). Post-Wilson we have applied the Louisiana one-year statute to section 1983 claims. Washington v. Breaux, 782 F.2d 553, 554 n.1 (5th Cir. 1986). Thus, though Wilson has rendered obsolete the specific analysis used by the district court—identifying a particular parallel state claim—we are in full agreement with the district court's decision to dismiss the claims under sections 1981, 1983, 1985, and 1986 based on the Louisiana one-year statute. See also Gates v. Spinks, 771 F.2d 916 (5th Cir. 1985) (applying Wilson retroactively), cert. denied, 106 S.Ct. 1378 (1986); Wycoff v. Menke, 773 F.2d 983 (8th Cir. 1985) (same), cert. denied, 106 S.Ct. 1230 (1986).

III. Limitations Period Applicable to Equal Pay Act Claims

An action brought under the Equal Pay Act, 29 U.S.C. § 206(d), must be commenced within two years of the violation

unless the violation was willful, in which case a three-year limitations period applies. 29 U.S.C. § 255.

Plaintiff's complaint is inartfully drawn and can be construed to allege Equal Pay Act violations based only on events ending, at the latest, in 1977. This is the view that the district judge took when he dismissed the Equal Pay Act claim as time-barred. However, "[w]e generally read the allegations in the plaintiff's complaint liberally." Berry v. Board of Supervisors, 715 F.2d 971, 975 (5th Cir. 1983). Read in this spirit, the complaint may allege Equal Pay Act violations that continued to the time of suit, and we assume that it did so (furthermore, in opposing defendants' Motion for Summary Judgment, plaintiff specifically stated that her claims under the Equal Pay Act were continuing).

We have held that a separate cause of action accrues under the Equal Pay Act each time the employee is paid. Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1050 (5th Cir.), cert. denied, 94 S.Ct. 121 (1973). "To hold otherwise would permit perpetual wage discrimination by an employer whose violation of the Equal Pay Act had already lasted without attack for over two years." Id. at 1050. See also Beebe v. United States, 640 F.2d 1283, 1293 (Ct. Cl. 1981) (under the Equal Pay Act "a separate cause of action accrued each payday"); Soler v. G. & U., Inc., 86 F.R.D. 524, 528 (S.D.N.Y. 1980) ("[a] separate cause of action pursuant to the Act accrues at each regular payday"). The district court may hence have erred in dismissing plaintiff's claims based on the Equal Pay Act because any such claims arising in the two or three years prior to suit were not barred. However, as will be shown, this was harmless error, and thus cannot furnish a basis to disturb the district court's judgment. Fed. R. Civ. P. 61; 28 U.S.C. § 2111.

Although the district court dismissed plaintiff's Equal Pay Act claim, it left intact her Title VII claims (except those prior to October 1976, which were barred by limitations). In the Title VII context, plaintiff had ample opportunity to show salary discrimination on the basis of sex and was unable to do so. The

relationship between Title VII and the Equal Pay Act is such that a finding of no salary discrimination under Title VII necessarily means that defendant has not violated the Equal Pay Act. A plaintiff cannot prevail under the Act unless he demonstrates that "the jobs in question require equal effort, skill, and responsibility, . . . and are performed under similar working conditions. . . . The plaintiff must meet each test in order to demonstrate a Pay Act violation." McKee v. McDonnell Douglas Technical Services Co., 700 F.2d 260, 262 (5th Cir. 1983). The requirements of Title VII are less onerous. In County of Washington v. Gunther, 101 S.Ct. 2242 (1981), the Supreme Court held that Title VII plaintiffs need not show that they were performing work equal to that of persons paid more. Further, "a Title VII cause of action may be asserted on the basis of wage discrimination premised on sex even though the claim does not support an Equal Pay Act violation." McKee, 700 F.2d at 264; Sellers v. Delgado College, 781 F.2d 503, 504 (5th Cir. 1986).[2]

A district court commits harmless error when it dismisses a valid claim if (1) the elements of the dismissed claim are identical to those plaintiff must prove to recover on a remaining claim and (2) the plaintiff fails to prove those elements. See Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977) (holding that trial court's error, if any, was harmless when it directed a verdict on a Sherman Act section 2 claim, because the jury failed to find the elements of a Robinson-Patman Act violation, which were identical to those it would have had to find on the section 2 claim), cert. denied, 99 S.Ct.

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[2]This does not render the Equal Pay Act superfluous. In Gunther, the Supreme Court observed that because of the Equal Pay Act's comparatively generous limitations period, and because, unlike Title VII, there is no requirement to first bring the complaint before an administrative agency such as the EEOC, "many plaintiffs will prefer to sue under the Equal Pay Act rather than Title VII." 101 S.Ct. at 2250 n.14.

103 (1978); cf. Scharnhorst v. Independent School District, 686 F.2d 637, 640-41 (8th Cir. 1982) (holding that any error trial court committed in failing to consider age discrimination claim separately from sex discrimination claim was harmless because employer articulated acceptable nondiscriminatory justification for discharge), cert. denied, 103 S.Ct. 2459 (1983). Under this rule, the district court's dismissal of so much of the Equal Pay Act claim as related to the three years preceding April 1981 was harmless, for plaintiff failed to show salary discrimination under Title VII, which from an employee's perspective is a more liberal statute. The district court found that "[p]laintiff presents no probative evidence of any salary discrimination" and, after reviewing the record, we conclude that the court's finding was not clearly erroneous.[3]

IV. Limitations Period for Title VII Violations

On April 6, 1977, plaintiff lodged her charge of discrimination against LSU with the EEOC. The district court held that any Title VII claim arising more than 180 days before April 6, 1977, was not timely filed with the EEOC and thus could not be litigated in federal court. We agree.

It is well established that "[t]imely filing is a prerequisite to the maintenance of a Title VII action." United Air Lines, Inc. v. Evans, 97 S.Ct. 1885, 1887 n.4 (1977). Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), requires a victim of discrimination to file a complaint with the EEOC within 180 days of the act's occurrence. Employers are entitled to treat their acts as lawful when employees do not file charges within the statutory period. Evans, 97 S.Ct. at 1889. Plaintiff does not question this rule, but seeks instead to litigate a multitude of prior allegedly

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[3]To the extent that plaintiff may have alleged a section 1981 violation based on pay discrimination within the year prior to suit (post-April 1980), a matter which we do not reach, any error in a limitations dismissal of such claim would be harmless for the same reason.

discriminatory acts under the "continuing violations" theory. The "precise contours and theoretical bases" of this theory "are at best unclear." Berry, 715 F.2d at 979. We have said several times that the law on the subject is "inconsistent and confusing." Glass v. Petro-Text Chemical Corp., 757 F.2d 1554, 1560 (5th Cir. 1985). In this case, however, it is not necessary to describe every scenario that might justify invoking the "continuing violations" theory, for Supreme Court and Fifth Circuit precedent make clear that it has no application here.

The first principle is that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." Delaware State College v. Ricks, 101 S.Ct. 498, 504 (1980). A corollary principle is that Title VII is not concerned with the present effects of a past statutory violation: "[T]he critical question is whether any present violation exists." Evans, 97 S.Ct. at 1889. In Berry, we attempted to identify a standard that would distinguish between acts sufficiently related to "constitute a continuing violation" and "discrete, isolated, and completed acts which must be regarded as individual violations." 715 F.2d at 981. The three factors we focused on there—subject matter, frequency, permanence—guide our inquiry here, though we reaffirm the statement in Berry that each inquiry "turns on the facts and context of each particular case." Id. In other fact settings, additional or alternative factors may be useful, but because the facts and claims in this case are so similar to those in Berry, we will rely on the factors identified there.

Plaintiff's reliance on the "continuing violations" theory appears to be based almost solely on the fact that she remains in the employ of LSU. Indeed, that is the chief distinction she proffers to set her case apart from Berry. However, continuing employment does not by itself bring her within the "continuing violations" theory. And any effects she may presently suffer as a consequence of acts occurring beyond the limitations period are irrelevant because Title VII reaches only violations, not effects.

The Berry factors also demonstrate that it would be inappropriate to apply the "continuing violations" theory here: (1) the subject matter of these stale alleged violation is most closely related to plaintiff's denial of promotion; (2) so far as can be determined from the record, any acts that were repetitive ceased prior to October 1976; (3) the apparent permanence of the past acts—especially plaintiff's 1971-72 transfer to the College of Education—was sufficient to "trigger [the plaintiff's] awareness of and duty to assert his or her rights . . . ." Berry, 715 F.2d at 981. See also Goldman v. Sears Roebuck & Co., 607 F.2d 1014, 1018-19 (1st Cir. 1979) (transfer from one department to another is not continuing violation), cert. denied, 100 S.Ct. 1317 (1980), cited with approval in Berry, 715 F.2d at 979, 981 n.15; Berry v. Board of Supervisors, 783 F.2d 1270 (5th Cir. 1986) (course teaching assignments not continuing violation).

In conclusion, the district court was correct to bar any Title VII claim based on acts occurring more than 180 days prior to the date on which plaintiff filed charges with the EEOC.

V. The Merits of the Title VII Claim

After ruling that most of plaintiff's claims were time-barred, the district court was left to try only the Title VII claims based on alleged salary discrimination and failure to promote. As stated in section III, supra, the district court's conclusion that plaintiff failed to prove salary discrimination is not clearly erroneous. Therefore, we conclude by reviewing the lower court's disposition of plaintiff's Title VII claims based on LSU's refusal to promote her to the rank of assistant professor in the fall of 1976 and thereafter.

The ebb and flow of Title VII litigation is governed by two leading Supreme Court cases: McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817 (1973), and Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981). Under McDonnell, a Title VII plaintiff must establish a prima facie case of forbidden discrimination before the employer is required to

offer legitimate justifications for his acts. 93 S.Ct. at 1824. Even after establishing a prima facie case, once the defense articulates a non-discriminatory explanation, the ultimate burden of proving discrimination remains with the plaintiff. Burdine, 101 S Ct. at 1093. The district court's fact-findings, including those respecting whether the defendant's actions were taken for discriminatory reasons, are reviewed under the clearly erroneous standard. Pullman-Standard v. Swint, 102 S.Ct. 1781 (1982).

To make out a prima facie case, plaintiff had to show by a preponderance that (1) she was a member of a protected group, (2) she was qualified for the promotion, (3) she was not given the promotion, (4) the promotion was available to others. McDonnell, 93 S.Ct. at 1824; Burdine, 101 S.Ct. at 1094 & n.6. Here plaintiff did not prove she was qualified for promotion, and defendant introduced ample evidence, credited by the district court, that she was not and that this was the reason she was not promoted. The district court's findings are not clearly erroneous.

Plaintiff had six days at trial and called numerous witnesses, but was unable to show that she qualified for a tenure track position. Her fatal deficiency was the absence of a doctorate, or even completed minimum required course work for it. The requirement of a doctorate is a perfectly reasonable condition for advancement in a University department seeking to enhance its reputation. The record does not reflect a discriminatory application of this requirement. At trial, plaintiff relied on a wide range of arguments, including the following: (1) her personal characteristics, such as fluency in foreign languages, justified an exception to the doctorate requirement; (2) the doctorate requirement was not strictly adhered to by some other universities, or by some other departments on the LSU-Baton Rouge campus; (3) there was an assistant professor (hired as such in 1964) in the College of Education who did not hold the doctoral degree. However, defendant's evidence persuasively rebutted every argument that plaintiff raised. A more detailed narrative of the proceedings would serve no purpose; suffice it

to say that, based on our review of the entire record, the district court's findings and conclusions with respect to the Tile VII claims, including the promotion claims, are not clearly erroneous. The district judge gave plaintiff every opportunity to prove herself a victim of sex and national origin discrimination, and inasmuch as she failed to do so, we affirm.

AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MS. LOURDES LENDIÁN DEYÁ

CIVIL ACTION

VERSUS

NO. 82–4627

THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET AL.

SECTION "C"

* * * * * * * * * * * * * * *

O P I N I O N

Plaintiff, Lourdes Lendián Deyá, a white female of Hispanic national origin who is presently employed as an Instructor of Education on the Baton Rouge Campus of Louisiana State University and Agricultural and Mechanical College, seeks redress for an alleged violation of her rights as protected under the Civil Rights Act of 1964, Title VII. Her claim was spurred, in essence, by the refusal of Louisiana State University and Agricultural and Mechanical College to promote plaintiff to the rank of Assistant Professor beginning in 1976. Plaintiff alleges defendants' failure to promote her was based on reasons of sex and national origin.

amount to little more than a verbatim recitation of the elements of Rule 23 of the Federal Rules of Civil Procedure. There is no evidence in the record to suggest that plaintiff has made any attempt to formally determine who potential class members are by name or statistical information. Plaintiff seems to rest on the commonly misheld presumption that every Title VII suit is a class action. The Supreme Court has specifically rejected that idea.[1] Even assuming that plaintiff has properly met the requirements of Rule 23, Class Certification, plaintiff has failed to comply with Local Rule of Court for the Eastern District, Rule 2.12, by not having timely moved for a determination of

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[1]See, General Telephone Co. of Southeast v. Falcon, 457 U.S. 147 (1982).

whether the action is to be maintained as a class action.[2] With the foregoing ruling made, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff, Lourdes Lendián Deyá, is a white female of Hispanic national origin who is presently employed as an Instructor of Education in the Department of Administrative and Foundational Services of the College of Education of the Baton Rouge Campus of Louisiana State University and Agricultural and Mechanical College (hereafter "LSU" or "University").

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[2]Plaintiff filed suit on April 28, 1981. Although the complaint contains class action allegations, plaintiff waited until the morning of trial, November 5, 1984, to move to certify this case as a class action. Plaintiff has failed to comply with the mandates of Rule 2.12(c) which provides:

> c. Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, F.R.Civ.P., as to whether the case is to be maintained as a class action. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appeared to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination shall be postponed, a date will be fixed by the court for renewal of the motion.

Plaintiff has clearly not complied with the mandates of Rule 2.12(c). To allow this matter to proceed to trial would not only prejudice the defendants but could also prejudice putative class members. Accordingly, the Court will not address the merits of class action determination.

2. Defendant, The Board of Supervisors of the University, is a corporation duly organized and existing under and by virtue of Article VIII, Section No. 7 of the Louisiana Constitution of 1974. It is authorized and empowered by that section of the Louisiana Constitution to administer and supervise the Louisiana State University system of which Louisiana State University–Baton Rouge is one campus.

3. This action is based upon the Civil Rights Act of 1964, Title VII, as amended 42 U.S.C. §2000e, et seq. Plaintiff claims that the University and fifteen of its employees unlawfully discriminated against her on the basis of sex and hispanic national origin. She has also filed suit alleging liability under the Equal Pay Act, 29 U.S.C. § 206(d) and 42 U.S.C. § 1981 et seq. alleging salary discrimination. Plaintiff seeks redress in the form of a promotion to Full Professor, tenure, back pay, broad remedial injunctive relief and attorneys' fees.

4. A discussion of the organizational hierarchy of the University, along with the procedural sequence of tenure decisions prevailing at LSU, is in order at this point. Administratively, the many academic disciplines involved in offering the comprehensive programs of the University are divided into colleges and schools, which in turn are subdivided into more than 100 departments or similar organizational units. The Chancellor is the Chief Administrative Officer of the Baton Rouge campus. There are several Vice-Chancellors reporting to the Chancellor, including a Vice-Chancellor for Academic Affairs and a Vice-Chancellor for Research.

The College of Education includes three departments plus the University Laboratory School. The Chief Administrative Officer of the College of Education is its Dean who reports to the Chancellor through the Vice-Chancellor of Academic Affairs. The College of Education formerly included the Department of Education, which in January of 1978 was subdivided into the Department of Administrative and Foundational Services and the Department of Curriculum and Instruction.

The School of Library and Information Science was known prior to 1981 as the Graduate School of Library Science and prior to 1973 as the School of Library Science. The Chief Administrative Officer of the School of Library and Information Science has carried the title of Dean since 1973 and of Director prior to that time. The Dean of the School of Library and Information Science reports to the Chancellor through the Vice-Chancellor for Research who has responsibility for the University's graduate program and has the Dean of the Graduate School on his staff.

5. In order to more clearly understand plaintiff's allegations of sex and national origin discrimination, the Court must carefully review both plaintiff's background and the history surrounding her attempts to receive tenure from the University. The evidence reflects that plaintiff was born in Havana, Cuba in 1925. She attended Randolph Macon College in Lynchburg, Virginia in 1943–46 but did not receive a degree. She immigrated to the United States in 1961 and received a B.A. Degree from LSU in 1962 with a major in Spanish. In 1963, she received a M.S. Degree in Library Science from the University. She was employed as an assistant cataloger by the Louisiana State Library during 1964–66. Plaintiff took additional courses in Library Science and Foreign Languages at the University in 1966 and 1967.

Effective September 7, 1967, plaintiff was employed in the School of Library Science with the faculty rank of Instructor. At the time of her employment, plaintiff was pursuing a Ph.D. Degree in foreign languages from the University. Under a policy known as PM-23 promulgated by the President in 1963, no one employed by the University at the faculty rank of Assistant Professor or higher was permitted to pursue a doctorate degree from the University. Plaintiff was aware of this policy and

accepted employment at the rank of Instructor with the intention of pursuing her doctorate studies.[3]

5. The Committee on Accreditation is authorized by the Council of the American Library Association to serve as an accrediting agency for programs of library education at the graduate level. It is important to note that in January of 1971, the Committee on Accreditation completed its review of the University's Library School with a critical report which concluded in part:

> "VOTED, that the Committee on Accreditation of the American Library Association discontinue accreditation of the program leading to the degree of Master of Science offered by the Library School of Louisiana State University effective July 1, 1972, unless during the interim evidence is submitted that the difficulties cited have been overcome. Such evidence is in effect an application for reaccreditation."

Among other criticisms, the American Library Association Committee on Accreditation concluded that the faculty of the program did not meet its standards for accreditation. The Committee was particularly critical of the number of faculty members with LSU degrees. The Committee also found that the program met the curriculum standard only at a minimal level. It criticized the Library School for offering both graduate and

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[3]Subsequently, however, plaintiff did not vigorously pursue studies in the doctorate program. In fact, she expressly resigned from the doctorate program in November of 1976. The record reflects that plaintiff signed up four times to take the qualifying examination and failed to take it.

undergraduate programs, recommending a redefinition of the educational objectives and goals of the Library School.[4]

In partial response to the criticisms contained in the American Library Association Accreditation Report, a plan was approved in October of 1971 to separate the graduate and undergraduate library science programs by transferring the undergraduate programs to the College of Education, effective January 12, 1972, at the beginning of the Spring semester. This formal written plan approved by the Chairman of the Department of Education, the Dean of the College of Education, the Director of the School of Library Science, the Vice-Chancellor for Academic Affairs and the Chancellor provided for the transfer of courses, the faculty members and the financial resources necessary to support the undergraduate program. Plaintiff and Ms. Betsy St. Julien were the full time faculty members transferred to support the undergraduate courses.[5] Initially, each was given a joint appointment in the College of Education and in the Library School, which had become known as the Graduate School of Library Science.

Subsequently, plaintiff's joint appointment was terminated, effective August 23, 1973. Since that date, plaintiff has been employed by the University exclusively as an Instructor in the Department of Education (now Department of Administrative and Foundational Services) in the College of Education.

7. LSU maintains a procedure of confidential peer review for promotion and tenure within the University. The procedure is set forth in writing and provides for multiple levels of review including review by the department of which the candidate is a

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[4]See Defendants' Exhibit #14, Report on Library School of Louisiana State University.

[5]Plaintiff objected vigorously to her transfer even to the point of making a public accusation of discrimination against the Director of the Library School in a letter to the editor of a national magazine published in October of 1972.

member. General rules for promotion and tenure at LSU are established by the LSU Board of Supervisors in its regulations. Within that framework, the Baton Rouge Campus has developed a policy statement, now known as "PS-36,"[6] which sets forth the criteria and procedures for promotion, tenure and other employment decisions concerning faculty members on that campus. The process begins with a recommendation from the departmental faculty. If the majority vote of the faculty is unfavorable, and the department chairman concurs, no further consideration is required. If the majority vote of the departmental faculty is favorable, then that recommendation proceeds to the Chancellor through channels with the recommendation of the department head and the Dean. Review by the Chancellor usually includes the advice of the Vice-Chancellor for Academic Affairs and the Vice-Chancellor for Research and Dean of the Graduate School. A favorable recommendation by the Chancellor would be forwarded to the President of the LSU

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[6]See Defendants' Exhibit 24. PS-36, revision 0, effective December 1, 1976, beginning on Page 7, provides in relevant part:

> B. Minimal standards by rank. Only in the most exceptional of circumstance will the University accept recommendations for appointment, promotion or tenure of candidates who do not meet the following qualifications:
>
> 1. Instructor. Minimal qualifications for appointment to the rank of Instructor are:
>
> a. A master's degree or equivalent post-graduate study or professional practice.
>
> b. Evidence of potential for excellence in teaching.
>
> 2. Assistant Professor. Minimal qualifications for appointment or promotion to the rank of assistant professor normally are:
>
> a. Highest degree requisite in the field.
>
> b. Demonstrated excellence in teaching and scholarship.

System, whose favorable recommendation would be presented to the LSU Board of Supervisors for final approval.

8. In the Fall of 1976, plaintiff made her first formal application for promotion from the rank of Instructor to the rank of Assistant Professor. In 1976, the faculty of the Department of Education did not recommend plaintiff for promotion, a decision in which her Department Chairman, Dr. Fred M. Smith, concurred. Plaintiff sought further administrative review, which ultimately did not result in a reversal of that decision. There is no evidence in the record to suggest that the judgment of the faculty

or of Dr. Smith was influenced by the fact that plaintiff is a woman, or that she is hispanic.[7]

10. In the Fall of 1977, plaintiff was again considered for promotion. The review was in accordance with the personnel review rules of the University. On this occasion, she received a favorable recommendation from the departmental faculty.[8] However, neither the Department Chairman nor Dean

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[7]On April 6, 1977, plaintiff filed a charge with the Equal Employment Opportunity Commission alleging sex and national origin discrimination in the denial of promotion and other employment decisions affecting her since September of 1971. A "no cause" determination was issued by the EEOC on January 30, 1981 with Notice of Right to Sue. Plaintiff filed suit on April 28, 1981.

Defendants filed a motion for partial summary judgment seeking to eliminate those employment grievances which were not preserved by the EEOC charge of April 6, 1977. Defendants argued that the only viable claims left are those which are allegedly based upon discriminatory actions which took place within the 180-day actionable period under Title VII, including allegedly "continuing violations" which extended into that period. This Court, by Minute Entry of November 2, 1984, granted LSU's motion for partial summary judgment. The Court held that only plaintiff's claims with respect to the October 11, 1976 promotion decision and plaintiff's claim of salary discrimination are timely. Accordingly, based on 42 U.S.C. § 2000e–5(e), the Court determined that the actionable period extended from October 7, 1976 through April 6, 1977. See Deya v. Board of Supervisors of LSU, 82–4627 (Minute Entry of November 2, 1984) citing Berry v. Board of Supervisors of LSU, 715 F.2d 971 (5th Cir. 1983) (quoting B. Schlar & P. Grossman, Employment Discrimination Law 232 (Supp. 1979); Scarlett v. Seaboard Coast Line Railroad Co., 676 F.2d 1043, 1049 (5th Cir. 1982).

[8]See Plaintiff's Exhibit #29, Correspondence from Mr. Wes Mc Julien, Chairman, Promotion and Tenure Review Committee.

recommended plaintiff for promotion. The reasons given mostly pertained to plaintiff's not having a Doctorate Degree. Chairman Fred Smith testified that he was unable to endorse this recommendation because in his opinion plaintiff did not possess the "highest degree requisite in the field," as required by PS–36. The Dean of the College of Education, Peter A. Soderbergh, agreed with Chairman Smith that the plaintiff did not possess the requisite academic creditials for promotion to Assistant Professor.[9] Chancellor Paul W. Murrill, Vice-Chancellor for Academic Affairs, Otis B. Wheeler, and Vice-President for Research, James G. Traynham, concurred in the conclusion reached by Dean Soderbergh and Chairman Smith. Accordingly, Chancellor Murrill chose not to recommend plaintiff's promotion to the President. The record reflects that since 1977, plaintiff has not sought promotion through University procedures. The Court cannot say that the University's determination that Ms. Deya's lacking the highest degree requisite in the field was unreasonable. In the academic community, the highest degree requisite in a field is usually referred to as the "terminal degree." This term is defined by PS–36 as, "the highest earned degree normally expected of professors in a particular field, usually but not necessarily the doctorate." This Court is reluctant to substitute its judgment for the academic experts in the field, no matter how impressive or not plaintiff's scholarly work appears to the Court.[10] The crucial inquiry for the Court is and has been

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[9]See Plaintiff's Exhibit #30, Letter to Plaintiff from Dean Soderbergh.

[10]Although the Court is impressed by the long years of service that plaintiff has made to the University and her extracurricular and professional activity, plaintiff's publication record while teaching in the School of Library Science is somewhat scant. Plaintiff has no significant publications or major committee appointments in any national organizations. Most importantly, plaintiff lacks a Doctorate in her field of work.

whether the decision not to promote the plaintiff was made without the influence of sex or national origin discrimination. This Court is unable to find any evidence that plaintiff's gender or national origin influenced the decision not to promote plaintiff to the rank of Professor.

10. Plaintiff does not question the requirement of a terminal degree. Instead, she contends that her Master's Degree is the terminal degree in Library Science, which should qualify her for promotion. Chairman Fred Smith replied in his unfavorable recommendation that the plaintiff was a member of the Department of Education, which, during his tenure from 1973 to 1978, had never appointed anyone to the rank of Assistant Professor who did not possess a Doctorate.[11]

Nevertheless, the evidence clearly reveals that the standards for academic qualifications are dynamic, rather than static, both within a discipline and within an institution of higher education such as LSU which is striving to upgrade the quality of its various departments and programs. There is no question that the policies instituted by the Library School were initiated to revitalize that program. Historically, in the field of Library Science, at a point in time when few persons with a Doctorate were available, library school faculties were partially staffed with persons who possessed only a Master's Degree. However, by the advent of the 1970's, the number of persons with Doctorates available for faculty employment in library schools substantially increased. Universities wishing to strengthen their

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[11]Implicit within plaintiff's argument is the somewhat confusing suggestion that she is entitled either to promotion within either the School of Education or the School of Library Science. In her application for promotion, plaintiff stated that there were large numbers of "educators in library science" who do not hold the Doctorate when in fact she was not applying for promotion as Assistant Professor of Library Science. To the contrary, plaintiff is seeking promotion as Assistant Professor of Education. See Defendants' Exhibit #6.

Library Science programs no longer hired faculty members without the Doctorate except under unusual circumstances in which the person possessed other exceptional qualifications.[12] The evidence reflects that this trend has continued.

The employment practice in the University's School of Library and Information Science is completely consistent with this pattern. Prior to 1967, a number of persons had been employed in the School at the rank of Assistant Professor or higher who did not possess the Doctorate. Since the plaintiff was employed in 1967, however, no one has been employed in the Library School above the rank of Instructor who did not possess the Doctorate or who had not completed all requirements for a Doctorate except the dissertation. Seventeen full time faculty members (10 female and 7 male) have been employed since 1967 in the Library School. Twelve of these faculty members already possessed the doctorate when they were employed. Four faculty members (2 female and 2 male) were in a status known as "ABD" (all but dissertation) in their doctoral programs. They had completed all of the requirements for a Ph.D. degree except their dissertation. Three of these four were awarded their Doctorates within two years of their employment at the University. The other ABD's resigned from the University in less than two years. The remaining faculty member employed since 1967 possessed only a Master's Degree, and she was employed at the rank of Instructor. Thus, everyone employed

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[12] Dr. Edward Holley, Dean of School of Library Science at the University of North Carolina, Chapel Hill, testified as an expert regarding the requirement of a Doctorate for selection of faculty in library schools. His testimony confirms the practice of library schools throughout the country of only hiring persons having a Ph.D. or who are "all-but-dissertation" at the level of Assistant Professor. In his opinion, the only relevant exceptions would include "very outstanding individuals with scholarly publications and who are well recognized in the library science field." Dr. Holley stated that in his opinion Ms. Deya did not possess the qualifications that would merit such an exception.

since 1967 in the Library School at the rank of Assistant Professor or higher either possessed the Doctorate or was ABD in the doctoral program. The four ABD's were employed prior to 1977; everyone employed since 1976 had already been awarded the Doctorate at the time of employment by the University. The evidence is clear that by the time plaintiff sought promotion from Instructor to Assistant Professor in 1976, the Doctorate was considered the terminal degree in the field of library science and that the University's School of Library and Information Science has consistently applied that standard in the employment of persons at the rank of Assistant Professor or higher since plaintiff's employment in 1967.

11. Likewise, since 1967, neither the Department of Education nor its successor, the Department of Administrative and Foundational Services, has initially employed nor promoted anyone at the rank of Assistant Professor or higher who has not possessed a Doctorate. The only persons in that department with the rank of Assistant Professor or higher without a Doctorate is Ms. St. Julien. She was initially employed in the Library School for the Summer Term in 1964 at the rank of Visiting Assistant Professor. In 1966, she was employed full time at the rank of Assistant Professor. She had over 25 years of experience as a Librarian prior to employment by the University. The evidence shows that she carried the rank of Assistant Professor with her when she was transferred to the Department of Education in 1972.

While the University employs a number of persons at the rank of Assistant Professor or higher who do not have a Doctorate, further analysis quickly reveals that the vast majority of these persons are in the School of Design, the School of Music, the School of Social Welfare, and other disciplines in which the Doctorate has not yet evolved as the terminal degree. For example, in the School of Music, performing artists are judged by their musical ability and performances rather than their academic credentials. Other exceptions may be explained by the early date at which the person achieved faculty rank. A few

exceptions have been made for outstanding ability or service. An analysis of the faculty reveals that the University has been consisted in the application of the PS–36 criteria.[13]

12. Plaintiff's complaint alleges that she was paid a lower salary than her Anglo-Saxon counterpart while performing equal work, a claim under the Equal Pay Act. The Court finds this complaint untenable and not well grounded in fact. The plaintiff is employed on an academic year basis. Of the 230 instructors employed by the University, plaintiff ranks 11th from the top in rate of pay. Her salary compares favorably with that of Ms. St. Julien who shares similar teaching responsibilities. Any difference between Ms. St. Julien and the plaintiff is easily explained by Ms. St. Julien's many years of experience prior to her employment at the University and her additional years of service at the University.

Comparison of plaintiff's salary with someone employed in an administrative position on a fiscal year basis in the School of Social Welfare is inappropriate.[14] Likewise, comparison with a productive scholar with a Doctorate Degree teaching at the graduate level in the School of Library and Information Science is inappropriate.[15]

Plaintiff presents no probative evidence of any salary discrimination. Any compensation differential applied by defendants was bona fide and not based on sex.

13. Plaintiff complains of the University's failure to employ her during the summer. She has not been employed to teach summer school since 1975 due to the low enrollment in her courses. It should be noted that her summer teaching was discontinued prior to her first application for promotion and

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[13]29 U.S.C. § 206(d) (1).

[14]See Plaintiff's Exhibit #12, comparison of plaintiff's salary with white male with M.S. Degree in Social Welfare.

[15]Plaintiff's Exhibit #13.

prior to any EEOC charge or formal complaint against any administrator in the College of Education. Plaintiff is employed on an academic year basis which does not assure summer employment. The evidence supports the conclusion that she was not employed in the summer for the very legitimate reason that the enrollment in her courses did not justify offering those courses during the summer term.

14. Plaintiff has accused the Faculty Grievance Committee of discrimination. The University faculty, separate and apart from the administration, elects a representative body known as the Faculty Senate. The Grievance Committee is a standing committee of the Faculty Senate charged with the mission of assisting in the resolution of complaints by faculty members against the administration. The administration cooperates with the Faculty Grievance Committee, but no administrative authority is delegated to that Committee. The Committee investigates faculty grievances and reports its findings and recommendations to the Faculty Senate.

On February 3, 1977, plaintiff filed a grievance petition with Thomas A. Harrell, Professor of Law and Chairman for 1976–1977 of the LSU Faculty Grievance Comittee. Chairman Harrell attempted to set up two meetings with plaintiff. She failed or refused to attend either meeting with Chairman Harrell. Because of plaintiff's failure to cooperate, the Grievance Committee never took action on her case. There is no evidence to support plaintiff's accusations against the Faculty Grievance Committee.

15. To the extent that these Findings of Fact also constitute conclusions of law, they are specifically adopted as both Findings of Fact and Conclusions of Law.

Conclusions of Law

1. The Court has jurisdiction over this matter pursuant to Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e–5(e).

2. Plaintiff filed charges with the EEOC on April 6, 1977. On January 30, 1981, the EEOC made a determination of plaintiff's charge. It concluded that her allegations concerning demotion, terms and conditions of employment, harassment and transfer were not timely. It further concluded that there was not reasonable cause to believe her allegations of discrimination with respect to promotion and pay. Notice of right to sue was issued at the same time as the determination. Plaintiff filed suit on April 28, 1981. Although the complaint contains class action allegations, the plaintiff did not move for certification of a class until the morning of trial.

3. By Minute Entry of May 25, 1984, this Court granted defendants' motion for summary judgment with respect to plaintiff's claims under 42 U.S.C. §§ 1981, 1983, 1985, and 1986 and 29 U.S.C. § 206(D) (1). Plaintiff having failed to timely move for certification of a class under the provisions of Federal Rules of Civil Procedure 23 as required by Local Rule 2.12(c), the motion for class certification is denied.

4. On November 2, 1984, this Court granted defendants' motion for partial summary judgment with respect to plaintiff's Title VII claims insofar as those claims related to alleged discriminatory action which took place more than 180 days prior to April 6, 1977, the date on which plaintiff filed her charge of discrimination with the EEOC, including: (a) any alleged claims based upon actions taken during plaintiff's employment in the School of Library Science from date of initial hire in August 1977 until her relationship was completely severed on August 23, 1977; (b) any alleged claim concerning the transfer of plaintiff to the Department of Education within the College of Eductaion on January 12, 1973; (c) any alleged claim concerning the termination of the joint appointment, effective August 23, 1973; and (d) any alleged claim relating to the failure to grant sabbatical leave.

5. The case is presently pending before the Court only on the plaintiff's claims under Title VII which were preserved by the filing of the change with the EEOC on April 6, 1977. The

essence of plaintiff's claim is that the failure to promote plaintiff to the rank of Assistant Professor in 1976 and 1977 amounted to a violation of Title VII.

6. Discriminatory treatment is established under Title VII by proof that plaintiff was treated less favorably than others solely because of her sex or national origin. Normally, the issue of discriminatory treatment is resolved by application of the three-part test established in McDonell-Douglas Corporation v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). First, the plaintiff has the burden of proving the existence of a prima facie case of discrimination by a preponderance of the evidence. In this context, the plaintiff must establish that she was a member of a protected group, that she was qualified for promotion and that she was not promoted under the circumstances, permitting an inference of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third the plaintiff then has an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. While the McDonell-Douglas test does shift the burden of production once a plaintiff has offered a prima facie case, the burden of persuasion remains upon the plaintiff at all times. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Zahorik v. Cornell University, 729 F.2d 85 (2nd Cir. 1984).

7. With respect to promotion from the academic rank of Instructor to that of Assistant Professor, the issue focuses upon whether plaintiff possesses the academic credentials for such a promotion. Her academic credentials can be a consideration in either the first or second steps of the McDonell-Douglas three-part test.

8. In the first instance, plaintiff must establish by a preponderance of the evidence that she is qualified for a promotion. If plaintiff does not prove that she possesses the

requisite academic credentials for promotion, then she fails to establish a prima facie case.

Even if she establishes that she has minimal qualifications, the University has every right to impose higher standards than minimal qualifications on its faculty, provided it does so in a fair and nondiscriminatory manner. Absent evidence sufficient to support a finding that such decisions are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own levels of academic achievement and to act upon the good faith judgments of their department faculties or reviewing authorities.

9. Although the plaintiff is a member of the Department of Administrative and Foundational Services within the College of Education, she suggests that she should be judged by the standards expected of faculty in the School of Library and Information Science. The record is abundantly clear that plaintiff does not possess the academic credentials of anyone initially employed in the School of Library and Information Science at the rank of Assistant Professor or above since plaintiff's employment in 1967. While a Masters Degree may have been acceptable in an earlier era, the record unquestionably establishes that a person without a Doctorate or the immediate expectation of a Doctorate would not be considered by the LSU School of Library and Information Science in 1976 or 1977 for employment at or promotion to the rank of Assistant Professor.

When viewed in the perspective of her own Department of Education, every faculty member at the rank of Assistant Professor or higher possessed a Doctorate in 1976 and 1977 except Ms. Betsy St. Julien who has retained the rank of Assistant Professor since her initial employment in 1964.

10. Because of the decentralized nature of the decision-making process, comparisons which might tend to show unlawful discrimination are hard to come by. A denial of tenure by one department because of the lack of a terminal degree cannot be compared with a grant of tenure by another. There are some disciplines within the University in which the Doctorate is

not the expected terminal degree. Plaintiff, however, must be judged by the standards of the department and discipline in which she teaches. It is clear that her department and discipline reasonably require a Doctorate for the rank of Assistant Professor. Plaintiff has not shown any exceptional scholarly activities, achievements or experience which might remotely justify consideration of an exception to the academic credentials normally required by her department and discipline.[16]

11. The Court concludes that plaintiff has failed to establish a prima facie case for discrimination in promotion. The failure of a plaintiff to possess a Doctorate is a legitimate, nondiscriminatory reason for the rejection of plaintiff's application for promotion which has not been shown to be a pretext for discrimination.

12. Plaintiff contends that she was paid a lower salary than her Anglo-Saxon counterpart while performing equal work. The text of the Equal Pay Act provides in relevant part:

> "No employer having empoyees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority

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[16]The Court has carefully reviewed plaintiff's background and the quality of her work at LSU; however, the Court must be careful not to overly scrutinize the merits of a tenure decision, where there is absent strong evidence of bias, or departures from procedural regularity.

> system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: . . . ."

29 U.S.C. § 206(d) (1) [emphasis added].

In order to establish a salary discrimination claim under Title VII, plaintiff may attempt to establish a violation by proof of unequal pay for equal work or by other proof of discriminatory intent. County of Washington v. Gunther, 452 U.S. 161, 101 S. Ct. 2242, 68 L. Ed. 2d 751 (1981); Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984). In making an equal pay comparison, the plaintiff must show that the jobs require equal skill, effort and responsibility and they are performed under similar working conditions.[17] In a major research institution, such as LSU, comparisons across disciplines and departments is unreliable because of the differing market conditions affecting each discipline and the differing emphasis which each department may place upon various performance considerations. In this setting, care must be taken to compare true equals. It is not appropriate to compare plaintiff with someone in a totally unrelated discipline with administrative responsibilities dissimilar to the responsibilities assigned plaintiff. Likewise, plaintiff cannot be compared fairly with someone possessing greater academic credentials teaching in a graduate program who by publication has established himself as a productive scholar in his discipline.

13. Plaintiff has shown no disparate treatment in her rate of salary. Her academic year salary ranks high among those paid to instructors by the University. She has failed to establish a prima facie charge of salary discrimination.

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[17] See Hodgson v. Golden Isles Nursing Homes, Inc., 468 F.2d 1256 (5th Cir. 1972) (substantial indemnity of job junctions necessary).

14. Finally, the Court finds no sufficient evidence to support any other claims of discrimination which may be timely under plaintiff's EEOC charge. While plaintiff may have beeen disappointed by various employment decisions, there is no showing that any decision was based upon any motive other than good faith exercise of fiscal and administrative responsibility. Since plaintiff has failed in her proof to establish a violation of Title VII, plaintiff's claim for relief on all counts must be dismissed with prejudice at her cost.

New Orleans, Louisiana, this the 15th day of October, 1985.

Robert F. Collins
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MS. LOURDES LENDIÁN DEYÁ	CIVIL ACTION
VERSUS	NO. 82-4627
THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET.A.	SECTION "C"

* * * * * * * * * *

JUDGMENT

This action came on for trial before the Court, Honorable Robert F. Collins, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that each party shall bear its own costs for this action.

New Orleans, Louisiana, this the 17th day of October, 1985.

s/Loretta G. Whyte
LORETTA G. WHYTE,
CLERK OF COURT

APPROVED AS TO FORM:
s/Robert F. Collins
UNITED STATES DISTRICT JUDGE

1-C
APPENDIX C

Supreme Court of the United States

No. A-451
LOURDES LENDIÁN DEYÁ,

Applicant,

v.

BOARD OF SUPERVISORS OF LOUISIANA
STATE UNIVERSITY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRITE OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, an the same is hereby, extended to and including January 23, 1987.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 16th
day of December, 1986.

APPENDIX "D"

CONSTITUTION

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "E"

* * *

SUBCHAPTER I—GENERALLY

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

* * *

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * *

§ 1985. Conspiracy to interfere with civil rights

* * *

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.
R.S. § 1980.

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* * *

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

R.S. § 1981.

APPENDIX "F"

* * *

§ 2000e–2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

Prohibition of sex discrimination

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

APPENDIX "H"

Rule 23 RULES OF CIVIL PROCEDURES

* * *

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

APPENDIX "I"

CHAPTER 4—LIBERATIVE PRESCRIPTION

Chapter 4 of Title XXIV of the Louisiana Civil Code of 1870, consisting of Articles 3528 through 3554, was revised, amended and reenacted by Acts 1983, No. 173, effective January 1, 1984, to consist of Articles 3492 through 3504. Acts 1983, No. 173, repealed Articles 3528 through 3531, 3533 through 3542, and 3544 through 3554. Article 3532 has been redesignated as an unnumbered paragraph of Article 10. Article 3543 has been redesignated as R.S. 9:5622.

Section 1—One Year Prescription

Art. 3492. Delictual actions

Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.

Acts 1983, No. 173, § 1.

APPENDIX "J"

* * *

§ 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.]—

(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued; [Emphasis added.]

APPENDIX "K"

* * *

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the

filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.